provides valuable insight in fields in which the ignorance of most lawyers must be remedied if judicial review of administrative decisions is to prosper; the commentaries of Professor Encel and of Dr Wilenski, as political scientist and "practising bureaucrat" respectively, add leaven to the legal loaf.

The third Part of the book is devoted to the contentious events of 11 November 1975. Professor Zines opens the debate with a full and careful statement of the background law and is attacked by his commentators in robust fashion. The next essay, by Professor Howard and Dr Saunders, subjects to a more detailed scrutiny the events themselves and is in turn challenged by Mr Ellicott in his commentary, while Sir Richard Eggleston provides a detailed exposition of his own particular interpretation of section 53 of the Constitution. Whatever conclusion is come to by the diligent and impartial reader (needless to say, a hypothetical figure), it will, after reading this Part, at least be founded on more solid material than has yet been offered by other, more sensational, works on the subject.

The final Part of the book, "A Labor Retrospect", consists of Mr Whitlam's own essay on his Government and the Constitution. It represents the latest in that sequence of recurring assessments of Australian federalism, as seen through a Labor leader's eyes, which, since the 1950s, have become a significant part of Mr Whitlam's contribution to political and constitutional debate. It alone of the essays lacks commentators and perhaps it is better so, a commentator would be hard put to match the characteristically astringent blend of analysis and pungent comment which is the hallmark of its author. To read it is to be reminded how much the other contributions in this book are necessarily biographical of three years of Mr Whitlam in office.

NINIAN STEPHEN*

Legislative, Executive and Judicial Powers in Australia by W. ANSTEY WYNES, LL.D., of the South Australian Bar. (The Law Book Co. Ltd, 1976, 5th Edition), pp. i-xlv, 1-590. Cloth, recommended retail price $34.50 (ISBN: 0 455 19389 4); Paperback, recommended retail price $24.50 (ISBN: 0 455 19388 6).

The reviewer worked in the fifties in the same Canberra office block as Dr Anstey Wynes, then Legal Adviser to the Department of External Affairs, Mr Leslie Lyons, then head of the Commonwealth Attorney-General's Department's Advisings Division, and Mr Leslie Zines (now Professor Zines of the ANU Law School). Dr Wynes had come to the Department of External Affairs in 1938 from Adelaide, to which he

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subsequently returned in 1959 as State Parliamentary Draftsman. The rhyming connexion between the names of Lyons, Wynes and Zines did not escape playful comment and remarks, and there were occasions, one of them amusing, on which telephone calls intended for one were directed to another. It was known at that time that Dr Wynes was busy outside his official hours in working on the next edition of his well-known book.

Dr Wynes died on 22 July 1975, at which time this 5th edition was in course of production, and he had completed his revision of all the galley proofs of the text. This edition therefore provides the occasion for going beyond a mere respectful or critical noting of yet another edition of a standard work. It must be said at once that the author's contribution, by way of careful and conscientious exposition over the years of Court decisions on Australian constitutional law, has been substantial. As late as 1963, the work was described as "the principal modern text and modern reference book for those concerned with what may loosely be called the 'Lawyer's Constitution' ". That accolade, though perhaps it could not be bestowed today, would be acknowledged by a generation of practitioners and students since the first appearance of the work in 1936. (In paying tribute, one should also refer to the author's wife, who provided more than ordinary help in getting editions ready for publication.)

The 1st edition, under the title, *Legislative and Executive Powers in Australia*, was rightly welcomed in 1936 as the first book of substance in the Australian constitutional field for some time. The *tour de force* of Sir John Quick and Sir Robert Garran in producing their great *Annotated Constitution of the Australian Commonwealth* in time for commencement of the Constitution in 1901 could only anticipate and guide the course of judicial decisions on the Constitution. Sir Harrison Moore's two editions of *The Constitution of the Commonwealth of Australia* in 1902 and 1910 were scientific studies of the Constitution, in the best sense of that expression, but they were written before the revolutionary year of 1920, in which the High Court gave its decision in the *Engineers' Case*.[1] The same comment applied to Sir John Quick's *The Legislative Powers of the Commonwealth and the States of Australia*, published in 1919. Dr Donald Kerr's *The Law of the Australian Constitution* was published in 1925, and its aims were modest. Given the substantial and growing body of judicial interpretation, the time had come for a coherent and comprehensive commentary on the Constitution in the light of the decisions.

The 1st edition of Wynes drew from one reviewer, unfairly, the descriptions of "little more than raw material" and "*travail preparatoire*", and, perhaps more pertinently, the comment that the legalistic tradition that the work worthily represents, untouched by speculative theory or by conscious sociology, is not adequate to the task of constitutional exegesis. The author, responding in his preface to the 2nd edition, only affirmed his adherence to the tradition of legalism, and

[1] *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd* (1920) 28 C.L.R. 129.

appropriately introduced the text with the now familiar words of Sir Owen Dixon on assuming the office of Chief Justice of Australia:

> It may be that the Court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism.[2]

That preface and quotation, possibly for reasons of space, have been omitted from the present edition, but the approach remains. One is still left with the feeling that there is rather more to constitutional interpretation than an Odgers or Craies on statutory interpretation can capture. Alfred Deakin, whose "cherished measure" it was to establish the High Court in 1903, saw it as more than a new Court; it was a Court with a new function to be exercised in *unfolding* the Constitution itself—"drawn as it of necessity was on simple and large lines, it opens an immense field for exact definition and interpretation".[3] He added:

> the statute stands and will stand on the statute-book just as in the hour in which it was assented to. But the nation lives, grows, and expands. Its circumstances change, its needs alter, and its problems present themselves with new faces. . . . Amendments achieve direct and sweeping changes, but the court moves by gradual, often indirect, cautious, well considered steps, that enable the past to join the future, without undue collision and strife in the present.[4]

Allowing for the splendid rhetoric of Deakin, his vision is the more authentic one. Of judicial statements since 1903 that might be cited in support, reference is made here to some observations on section 92 in the recent decision of the High Court in *North Eastern Dairy Co. Ltd* v. *Dairy Industry Authority (N.S.W.)*[5] that appear to adopt Deakin's approach. Thus, Mr Justice Mason observed:

> The freedom guaranteed by s. 92 is not a concept of freedom to be ascertained by reference to the doctrines of political economy which prevailed in 1900; it is a concept of freedom which should be related to a developing society and to its needs as they evolve from time to time. Section 92 finds its place in a Constitution which was intended to operate beyond the limits of then foreseeable time. . . .

We unfortunately cannot have the benefit of Dr Wynes' comments on these observations, but his treatment of the earlier dictum of the Privy Council in the *Banking Case*—"[e]very case must be judged on its own facts and in its own setting of time and circumstance"[6]—indicates the likely nature of his response (5th ed. pages 294-295). It would not have been supportive.

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[2] (1952) 85 C.L.R. xiv.
[3] Common. Parl. Deb. 1902, Vol. 8, 10965.
[4] *Id.* 10967-10968.
[5] (1976) 50 A.L.J.R. 121, 140 (*per* Mason J.), 142-143 (*per* Jacobs J.).
[6] *The Commonwealth* v. *Bank of N.S.W.* (1949) 79 C.L.R. 497, 640-641.

Nevertheless the work remains as a worthy exercise of the legal tradition it represents. It has throughout had a critical aspect, including as indicated an occasional robust expression of dissent where error was thought to have been committed. The preface to the 4th edition quoted another remark of Sir Owen Dixon that "it is not everything that appears in the Law Reports that is law . . .".[7] The successive editions bear testimony to a willingness to express a respectful personal opinion.

Thus, on the question whether the Commonwealth in consenting to an alteration of Commonwealth limits under covering clause 8 of the Constitution Act must obtain the consent of a State Parliament and the approval of its electors under section 123 of the Constitution where such an alteration involves an alteration of State limits, the author has given a firm negative answer, while noting the existence of a contrary view (5th ed., page 112). He was disposed to the wider view of the "external affairs" power as extending to the implementation of any treaty—"where a positive obligation has been undertaken, it is difficult to say that the subject of an international agreement is not in itself of an international character" (page 298). Also, the power is not limited to "treaty legislation" and is "eminently susceptible" within limits to expansion under the doctrine of generic interpretation (page 301). (The author, as Legal Adviser to the Department of External Affairs from 1952 to 1959, speaks, as it were, as an expert witness on the potentialities of this power.) But appeals to the Privy Council from State courts exercising State jurisdiction are thought to be outside those limits as being an "internal" matter. *Barger's* case[8] is said to have been wrong in relation to the taxing power, because its commitment to examining the "substance" of a taxing measure involves questions of a political character and of expediency (pages 38, 186). The Privy Council decision in *Moran's* case[9] is criticised on similar grounds. (See now the comments in the *Murphyores* case,[10] on the correctness of *Barger's* case.) The personal view that the exclusive power under section 52(i) extends only to Commonwealth places *as places* is adhered to, though the law has now been settled to the contrary (page 123). The emasculation by *R.* v. *Archdall*[11] of the requirement in section 80 that trial on indictment be by jury is critically examined (pages 444-445), although the decision is accepted as settled law (*cf.* now the remarks in *Beckwith* v. *R.*[12]). The work has always taken the view that "insurance" in section 51(xiv) merely referred to insurance contracts in their ordinary sense and did not contemplate a compulsory levy of tax for the purpose of, for example, a National Insurance Bill. The point remains unsettled.

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[7] *White* v. *R.* (1962) 107 C.L.R. 174, 175.

[8] *R.* v. *Barger* (1908) 6 C.L.R. 41.

[9] *W.R. Moran Pty Ltd* v. *Deputy Federal Commissioner of Taxation (N.S.W.)* (1940) 63 C.L.R. 338.

[10] *Murphyores Inc. Pty Ltd* v. *The Commonwealth* (1976) 50 A.L.J.R. 570, 579.

[11] *R.* v. *Archdall and Roskruge; ex parte Carrigan and Brown* (1928) 41 C.L.R. 128.

[12] (1977) 51 A.L.J.R. 247, 254.

The 1st edition accurately predicted the decision of the Privy Council in *James* v. *The Commonwealth*[13] that section 92 binds the Commonwealth. Dr Wynes has always agreed with the view of Sir Owen Dixon, first propounded in his dissenting judgment in *Gilpin's* case,[14] that the freedom of interstate trade to which section 92 refers relates to restrictions or burdens imposed in virtue of those characteristics which a transaction must have to be itself a transaction of interstate trade. No doubt Dr Wynes was gratified to see the view become widely accepted as being the key to solve the riddle of section 92, but it seems that it has passed its zenith. The 5th edition notes the attack upon this test mounted by the present Chief Justice, Sir Garfield Barwick, in his dissenting judgments in the *Readers Digest* case[15] and in the *Mowbray* case.[16] Since the 5th edition was written the attack has continued in the *North Eastern Dairy* case.[17] On the other hand Dr Wynes accurately anticipated the overriding by the latter decision of the *Milk Board* case.[18] He agreed with the view now expressed by Sir Garfield Barwick in the same decision that *Hartley* v. *Walsh*[19] was wrongly decided. Incidentally, the judgment of Sir Garfield Barwick in the *North Eastern Dairy* case cites Wynes' 4th edition in relation to *Hartley* v. *Walsh.*

Uncharacteristically, the work is ambiguous when it turns to "New States", holding that discriminatory conditions on admission can be imposed under section 121 but also that the new State, after formation and admission, would be entitled to complete equality of status (page 111). This is the exception. Generally speaking, the personal pronouncements are, if concise, expressed with admirable clarity.

So much for the general approach and the critical element. The chapter structure of the present edition, it should be said, closely follows that of the 4th edition. For the many familiar with previous Wynes, there are no surprises or new departures in the subjects covered. Indeed, in substance, this edition is the 4th edition brought up to date to about the end of 1974. (The publishers should note that it would be useful to have the cut-off date for decisions provided rather than leaving it to the reader to work out, but perhaps the circumstances of the publication explain, if they do not justify, the omission of a feature that was conscientiously included by the author in earlier editions.)

It is of course the occupational hazard of authors that the stream of authority does not respect publication dates, but the stream has run particularly strongly since the end of 1974 and one is bound to wonder whether the format of the text, if produced today, would not have needed restructuring to maintain its ambitious claim to present a

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[13] (1936) 55 C.L.R. 1.

[14] *O. Gilpin Ltd* v. *Commissioner for Road Transport and Tramways (N.S.W.)* (1935) 52 C.L.R. 189, 204 *et seq.*

[15] *Samuels* v. *Readers' Digest Association Pty Ltd* (1969) 120 C.L.R. 1, 17-18.

[16] *S.O.S. (Mowbray) Pty Ltd* v. *Mead* (1972) 124 C.L.R. 529, 549.

[17] (1976) 50 A.L.J.R. 121.

[18] *Milk Board (N.S.W.)* v. *Metropolitan Cream Pty Ltd* (1939) 62 C.L.R. 116.

[19] (1937) 57 C.L.R. 372.

coherent view of what has been decided. Questions of double dissolutions, Parliamentary representation of the Territories, the High Court's constitutional role *vis-à-vis* the Privy Council, the seaward limits of the States, the respective offshore rights of Commonwealth and States and the constitutional rights of electors are among the many issues that have since been examined by the High Court and indeed claimed the attention, interest and concern of a wider group than those who normally concentrate on the "Lawyer's Constitution", if indeed that phrase itself is admissible today or ever was. The nation's problems present themselves with new faces.

P. BRAZIL*

Constitutional Law by CHRISTOPHER ENRIGHT, LL.B. (Syd.), B.A. (Newcastle); Lecturer in Legal Studies, University of Newcastle. (The Law Book Company Limited, 1977), pp. i-xlviii, 1-374. Cloth, recommended retail price $21.50 (ISBN: 0 455 19459 9); Paperback, recommended retail price $15.50 (ISBN: 0 455 19460 2).

Mr Enright, a lecturer in Legal Studies at the University of Newcastle, fills a need among Australian teaching requirements with the first ever comprehensive introduction to Australian constitutional studies. He provides some outline of constitutional and legal history as well. Some of the material on statutes and their interpretation, and on judicial decision and the structure of the unenacted law, is also appropriate to courses on legal method or elementary jurisprudence. All this is treated in strict text book fashion, not in the curent vogue by the accumulation of statutes, cases and "materials". He justifies the book on a pedagogical principle which has gone out of fashion among educational experts, though it may well come back into fashion. In his own words: "I believe that one of the best ways of teaching a law subject is to commence by outlining the subject in general terms. This provides the background which gives a student some perspective and a feel for the shape of the subject, so that he can proceed to a deeper study of it where he can examine its principles in more detail, its underlying theory and its social utility".

It is likely that he had in mind the specific requirements of the legal studies courses, not leading to full professional qualification, which have been and will be established in all tertiary institutions, but it will be apparent to law teachers that a book of this kind can be used for a mixture of purposes in the first year of full-scale law courses as well.

The peculiarity of the book as compared with any of its Australian predecessors is that it attempts to pay about equal attention to the two main levels of Australian government—State and Commonwealth —and also to the structure of parliamentary, responsible, cabinet, monarchically based government common to both levels. No previous

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